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12 **UNITED STATES DISTRICT COURT**

13 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

14
15 DARYELLE LAWANNA PRESTON,

16 Plaintiff,

17 v.

18 CITY OF OAKLAND; DEANNA
SANTANA, in her individual capacity; and
19 DOES 1 through 10, inclusive,

20 Defendants.

Case No. 3:14-cv-2022 NC

**DEFENDANT CITY OF OAKLAND AND
DEANNA SANTANA'S NOTICE OF
MOTION AND MOTION FOR
DISQUALIFICATION OF PLAINTIFF'S
ATTORNEYS AND FOR ORDER
REQUIRING RETURN OF
DOCUMENTS; MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

Date: January 28, 2015
Time: 2:00 p.m.
Ctrm.: No. 7

Assigned for All Purposes to:
Magistrate Judge Nathanael Cousins

Action Filed: March 17, 2014
Trial Date: September 14, 2015

1 **PLEASE TAKE NOTICE THAT** on January 28, 2015 at 2:00 p.m., Defendants will and
 2 hereby do move this Court for Orders: (1) disqualifying Plaintiff's attorneys Siegel & Yee (and all
 3 lawyers and paralegals associated with the firm) from serving as counsel for Plaintiff or otherwise
 4 assisting Plaintiff in her prosecution of the action; and (2) requiring Plaintiff and her attorneys to
 5 return and/or permanently delete all documents of any kind, especially those that are attorney
 6 client privileged, that Plaintiff improperly took from Defendant the City of Oakland ("the City")
 7 when she was terminated from employment with the City.

8 This Motion is made on the grounds that Plaintiff improperly took from the City numerous
 9 documents which belong to the City, including at least 57 pages of attorney client privileged
 10 documents that Plaintiff's attorneys have improperly reviewed, analyzed and used in this litigation
 11 in violation of their ethical obligations under the decisions of *Rico v. Mitsubishi Motors Corp.*, 42
 12 Cal.4th 807 (2007); *Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725 (2009); and *Clark*
 13 *v. Superior Court*, 196 Cal.App.4th 37 (2011).

14 This motion is and will be supported by this Notice of Motion, the accompanying
 15 Memorandum of Points and Authorities, the Declaration of Geoffrey Spellberg (including the
 16 privileged documents submitted to the Court herewith under seal) and on the record and file
 17 herein.

18 DATED: December 23, 2014 MEYERS, NAVE, RIBACK, SILVER & WILSON

19 By: /s/ Geoffrey Spellberg
 20 Camille Hamilton Pating
 21 Geoffrey Spellberg
 22 *Attorneys for Defendants CITY OF OAKLAND*
and DEANNA SANTANA

23 DATED: December 23, 2014

24 By: /s/ Otis McGee
 25 Barbara J. Parker
 26 Otis McGee, Jr.
 27 Maria Bee
 28 James F. Hodgkins
Attorneys for Defendants CITY OF OAKLAND
and DEANNA SANTANA

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MEMORANDUM OF POINTS AND AUTHORITIES

I. Summary of the Argument

Plaintiff Preston ("Preston" or "Plaintiff") is the former Director of Employee Relations for the City of Oakland who was dismissed for numerous instances of improper conduct. She has brought this lawsuit claiming that she was discharged in retaliation for engaging in several alleged whistle blowing activities. Preston is represented by the law firm of Siegel & Yee (hereinafter "the Attorneys").

Before and at the time that she was discharged, Plaintiff collected and took a number of City documents that she apparently felt would be helpful to her in this litigation.¹ In response to Defendant's document request (Spellberg Decl., Ex. B), Plaintiff produced 435 pages of City materials, of which 21 documents (comprising 57 pages) are attorney client privileged. Of those 21 documents, 18 are privileged documents exchanged between City officials (including the City Council) and Barbara Parker (Oakland City Attorney), or her Deputy City Attorneys Doryanna Moreno and Caryl Casden. Three of the 21 privileged documents are communications with Oakland's outside counsel, Charles Sakai and Jonathan Holtzman, from Renne, Sloan, Holtzman and Sakai ("the Renne Sloan firm").

All of the privileged documents produced by Plaintiff and at issue in this motion are designated with her Bates Stamp "LP xxx." These 21 documents are being submitted to the Court under seal for review. Redacted versions of these documents are Exhibit C to the Spellberg declaration. The substance of the communications has been redacted, but not the sender and recipients.

Most of these privileged documents involve legal advice given by the Oakland City Attorney about the exact issues that Plaintiff has raised in this litigation. Because Barbara Parker and the Oakland City Attorney's Office are defense counsel of record in this case, this means that

¹ For example, Exhibit A to the Spellberg Declaration shows that Plaintiff was emailing internal City documents directly to her lawyer (Dan Siegel) from her City computer while she was still employed.

1 Plaintiff and her attorneys have intentionally reviewed and analyzed defense counsel's legal
 2 analyses of the very same issues raised by Plaintiff in this lawsuit. What could be more prejudicial
 3 to Defendants then to have their internal legal analysis about key litigation issues given to
 4 opposing counsel?

5 A chart is set out below which shows how virtually every attorney client communication
 6 discusses and in some instances analyzes the issues that Plaintiff has raised in her complaint. The
 7 evidence supporting this motion is unequivocal that the Attorneys possess, have examined, and are
 8 using to prosecute this litigation almost two dozen attorney client protected documents that
 9 Preston stole from the City. Unquestionably, this constitutes misconduct compelling the Court to
 10 disqualify the Attorneys from further representing Plaintiff in this action.

11 Under controlling California law,² after realizing that documents appear to contain another
 12 party's privileged or work product information, an attorney who receives those documents must
 13 (1) refrain from even looking at them any more than is essential to ascertain if the materials are
 14 privileged, and (2) immediately notify the sender that he or she possesses material that appears to
 15 be privileged. *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 817 (2007); *Clark v. Superior*
 16 *Court*, 196 Cal. App. 4th 37, 53 (2011). An attorney's failure to comply with these standards can
 17 "compel disqualification." *Rico*, 42 Cal.4th at 819. The determination whether a document is
 18 privileged does not include a review of the contents of the document or communication - only an
 19 examination of the relationship between the participants to the communication is permitted.
 20 *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 739 (2009) ("And because the
 21 privilege protects a transmission irrespective of its content, there should be no need to examine the
 22 content in order to rule on a claim of privilege.")

23 Preston's attorneys violated this clear standard by not only reviewing in detail and failing
 24 to return City of Oakland's privileged communications, but by analyzing the documents for

25
 26 ² California law applies in determining matters of disqualification. *In re County of Los Angeles*, 223 F.3d 990, 995
 27 (9th Cir. 2000) ("[W]e apply state law in determining matters of disqualification"); *Advanced Messaging Techniques,*
 28 *Inc. v. EasyLink Services Intern. Corp.*, 913 F. Supp. 2d 900 (C.D. Cal. 2012) ("The Ninth Circuit, however, has made
 clear that a federal court in California must apply California law in a disqualification motion.").

1 relevance and then producing them to Oakland in this case. These purposeful ethical violations
 2 require the Court to disqualify Siegel & Yee from any further work or involvement in this case.

3 In addition, Defendants seek an order requiring Plaintiff (and the Attorneys) to return every
 4 document (including all privileged documents) that Plaintiff took from the City when she was
 5 discharged. All documents taken by Plaintiff, including hard copy and electronic documents, must
 6 be ordered returned and all electronic versions deleted from every computer and storage device
 7 used by Plaintiff and her Attorneys.

8 **II. Relevant Factual Background**

9 Preston is the former Director of Employee Relations for the City of Oakland. The Director
 10 of Employee Relations is a high level, "at will" position reporting directly to the City
 11 Administrator. In her capacity as Director of Employee Relations, Preston was privy to and
 12 participated in attorney client privileged communications. She worked with members of the
 13 Oakland City Attorney's Office, as well as outside legal counsel, with respect to myriad sensitive
 14 labor relations issues.

15 Preston was dismissed from employment on October 3, 2013. Following that termination,
 16 Preston filed a complaint against the City of Oakland alleging violations of Labor Code section
 17 1102.5 and 42 U.S.C. section 1983.

18 As the litigation progressed, Defendants served a document request seeking all relevant
 19 documents. (Spellberg Dec., Ex. B.) Those requests show that Defendants sought production of
 20 documents that relate to key allegations raised in Plaintiff's Complaint. Those are:

21 1. The Rainbow Teen Center issues, and specifically the report prepared about those
 22 issues. (Complaint ¶¶ 18-20)

23 2. The Local 55 negotiations and signed Tentative Agreement with Local 55.
 24 (Complaint ¶¶ 22-25)

25 3. The City's alleged failure to collect SEIU dues from Temporary Part Time
 26 employees and the alleged failure to investigate the issue. (Complaint ¶¶ 26-33, 35-40)

27 4. The alleged failure to properly implement a two percent wage increase. (Complaint
 28 ¶ 34)

In response to the document requests related to these relevant issues, Plaintiff produced 453 pages of documents. (Spellberg Decl. ¶ 4). Upon review of these documents, defense counsel learned for the first time that Preston had taken numerous confidential documents, including 57 pages (involving 21 documents) which are clearly protected by the attorney client privilege.

Plaintiff was obviously taking City documents to help support her lawsuit. She sent two emails to Mr. Siegel in mid-September 2013, several weeks before she was dismissed. (See Spellberg Decl., Ex. A). Notably, Preston forwarded these internal City documents to Siegel from her work computer. She also took hundreds of other City documents when she left employment, including the attorney client privileged documents that she later produced in response to Defendants' document requests.

Virtually every one of the privileged documents relates to four central issues raised in her complaint. A chart of the privileged documents (which are Exhibit C to the Spellberg Declaration) and a short summary of each follows:

Bates Number	Nature of Privilege	Parties in Communication	Summary of Document
LP13 - 14	Attorney-Client	Email from Barbara Parker to Deanna Santana	Legal advice about a DCV-labor classification.
LP16 - 17	Attorney-Client	Multiple emails from Deputy City Attorneys Doryanna Moreno and Caryl L. Casden	Legal advice about an employee suspension issue.
LP50 - 58	Attorney-Client	Emails between Barbara Parker, Deanna Santana, other City Managers	Discussion about legal advice from City Attorney about the cashing out of sick leave.
LP93	Attorney-Client	Emails from Deanna Santana to City Attorney Parker, Deputy Moreno and other City Managers	Information being provided for the Rainbow Teen Center report.
LP94-95	Attorney-Client	Emails between Barbara Parker and Deanna Santana, et al.	Request for legal advice regarding the Rainbow Teen Center issues.
LP96	Attorney-Client	Email from Barbara Parker to Deanna Santana, et al.	Discussion of revisions to the Rainbow Teen Center Report.
LP230-231	Attorney-Client	Various emails from Barbara Parker to Santana, City	Legal discussion of the impact of District Court Judge Henderson's

Bates Number	Nature of Privilege	Parties in Communication	Summary of Document
		Councilmembers and other City Managers.	refusal to sign a proposed order affecting the Police Department.
LP266-267	Attorney-Client	Email from Barbara Parker to Deanna Santana	Legal advice regarding treatment of furlough days.
LP268 - 270	Attorney-Client	Emails between Barbara Parker and Lawanna Preston, et al.	City Attorney providing legal advice to Plaintiff in response to Plaintiff query about floating holidays.
LP283 - 285	Attorney-Client	Emails between Barbara Parker/Doryanna Moreno and Lawanna Preston	Plaintiff Preston sending information to City Attorney about the Local 55 Tentative Agreement.
LP290 - 291	Attorney-Client	Exchange of emails from Doryanna Moreno and Lawanna Preston and Deanna Santana	Plaintiff Preston asking for a legal opinion about the Local 55 Tentative Agreement issues.
LP292	Attorney-Client	Email from Charles Sakai to Deanna Santana, et al.	Outside counsel Sakai describing the status of the union bargaining efforts with OPOA.
LP302	Attorney-Client	Email from Charles Sakai to Deanna Santana, et al.	Outside counsel Sakai describing the status of the union bargaining efforts with OPOA.
LP309-310	Attorney-Client	Email from Deanna Santana to Barbara Parker, Lawanna Preston, et al.	Legal discussion about a Tentative Agreement reached with the OPOA.
LP322-323	Attorney-Client	Email from Deanna Santana to Lawanna Preston and Jonathan Holtzman	Discussion about SEIU part time MOU proposals with outside counsel Holtzman.
LP324-325	Attorney-Client	Emails from and to Barbara Parker and Doryanna Moreno	Request for legal opinion about cameras in Head Start classrooms.
LP334 - 339	Attorney-Client	Emails between Caryl L. Casden and Katano Kasaine, Lawanna Preston	Legal advice from attorney Caryl L. Casden regarding a Local 1021 grievance.
LP390 - 391	Attorney-Client	Email from Lawanna Preston to Deanna Santana and Barbara Parker	SEIU grievance regarding withholding of union dues.
LP407 - 408	Attorney-Client	Email from Deanna Santana to Lawanna Preston and Barbara Parker	SEIU grievance regarding withholding of union dues.

Bates Number	Nature of Privilege	Parties in Communication	Summary of Document
LP409 - 412	Attorney-Client	Email from Lawanna Preston to Barbara Parker and Doryanna Moreno	Providing information regarding the SEIU grievance.
LP421- 422	Attorney-Client	Email from Barbara Parker to Lawanna Preston	Legal discussion about settlement negotiations with Local 21.

While working at Oakland, Preston communicated with the City's legal counsel regarding each of the four issues that she raises in her complaint. As City management internally discussed those issues, the City Attorney (Barbara Parker and her Deputies Doryanna Moreno and Caryl Casden) provided legal opinions to Preston and others about those issues. These legal opinions and discussions – about the very issues that Plaintiff now raises in her complaint – comprise the majority of the 21 privileged documents which Plaintiff produced in response to the discovery requests.

Preston's attorneys, Siegel & Yee, have now received from Plaintiff various legal analyses by City attorneys about key issues that the firm is litigating in this case. The prejudice to Defendants is presumed and obvious. On these facts, Preston's Attorneys cannot be permitted to continue in this litigation. The Court must order their disqualification. And concurrent with that disqualification, Oakland seeks an order requiring return of all improperly taken documents which is not just the privileged documents at Spellberg Decl., Ex. C. As discussed below, Plaintiff improperly took hundreds of pages of confidential City documents and in whatever form she possesses them, those documents must be returned and/or permanently deleted.

III. ARGUMENT

A. Applicable Legal Standards

A district court has the inherent authority to disqualify counsel. *See United States v. Wunsch*, 84 F.3d 1110, 1114 (9th Cir. 1996). Lawyers who appear before the United States District for the Northern District of California are required to comply with the California Rules of Professional Conduct. *See* Civ. L.R. 11-4(a)(1) (requiring that all members of the bar of this

1 Court and attorneys permitted to practice before the Court pro hac vice must be “familiar and
 2 comply with the standards of professional conduct required of members of the State Bar of
 3 California”). In order to determine whether to disqualify counsel, the Court applies California
 4 law. *See In re County of Los Angeles*, 223 F.3d 990, 995 (9th Cir. 2000); *Hitachi, Ltd. v. Tatung*
 5 *Co.*, 419 F. Supp. 2d 1158, 1160 (N.D. Cal. 2006).

6 A court should examine a motion to disqualify counsel carefully “to ensure that literalism
 7 does not deny the parties substantial justice.” *People ex rel Dept. of Corporations v. Speedee Oil*
 8 *Change Systems, Inc.*, 20 Cal. 4th 1135, 1144 (1999) (“*Speedee Oil*”). Thus, a court must balance
 9 such varied interests as a party's right to chosen counsel, the interest in representing a client, the
 10 burden placed on a client to find new counsel, and the possibility that “tactical abuse underlies the
 11 disqualification motion.” *Id.* at 1145.

12 An order of disqualification of counsel is a drastic measure and the City does not make
 13 this motion lightly. *In re Marvel*, 251 B.R. 869, 871 (N.D. Cal. 2000) (citing *Schiessle v.*
 14 *Stephens*, 717 F.2d 417 (7th Cir. 1983)). “Ultimately, however, a court must maintain ethical
 15 standards of professional responsibility.” *Hitachi*, 419 F. Supp. 2d at 1161 (citing *Speedee Oil*, 20
 16 Cal. 4th at 1145).

17 As the party asserting privilege, the City bears the burden of establishing the preliminary
 18 facts necessary to support “a prime facie claim of privilege.” See *Costco Wholesale Corp. v.*
 19 *Superior Court, supra*, 47 Cal.4th at 733 (2009). The concurrently-filed Spellberg Declaration sets
 20 forth the basis for the City’s claims of attorney-client privilege as to each document and plainly
 21 establishes the basis for the claim of privilege. Each of the privileged documents was sent by, sent
 22 to or copied to the Oakland City Attorney, Barbara Parker, her Deputies Doryanna Moreno and
 23 Caryl Casden, or outside counsel at the Renne Sloan firm.

24 The documents themselves show that “the dominant purpose of the relationship between the
 25 parties to the communication was one of attorney-client.” *Clark*, 196 Cal. App. 4th at 51. There is
 26 no question that the communications at issue are “protected by the privilege.” *Clark*, 196 Cal.
 27 App. 4th at 51. Because the documents are privileged, Siegel & Yee was prohibited from
 28 reviewing and analyzing the documents.

B. California Law Prohibits An Attorney from Making Use of an Adversary's Privileged Documents

Preston's attorneys are not permitted to use the City's privileged documents in any aspect of their case prosecution. The authority is clear:

"[A] lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged . . . must (1) refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and (2) shall immediately notify the sender that he or she possesses material that appears to be privileged." *Clark v. Superior Court*, 196 Cal. App. 4th 37, 53 (2011) (quoting *State Fund Comp. Ins. v. WPS, Inc.*, 70 Cal. App. 4th 644, 656 (1999)); *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 817 (2007).

This rule is "the standard governing the conduct of California lawyers" after having received an adversary's apparently privileged or work product materials. *Rico*, 42 Cal.4th at 817. It is an objective standard. *Id.* at 818. "In applying the rule, courts must consider whether reasonably competent counsel, knowing the circumstances of the litigation, would have concluded the materials were privileged, how much review was reasonably necessary to draw that conclusion, and when counsel's examination should have ended." *Id.* Although "mere exposure" to an adversary's privileged information will not compel disqualification, an attorney's failure to comply with these standards can "compel disqualification." *Id.* at 819.

Here, the Attorneys should have readily been able to determine that the 21 documents at issue are privileged emails exchanged among the Oakland City Attorney and high ranking Oakland officials. Lead counsel for Plaintiff, Dan Siegel is a long time Oakland attorney who was once an aide to Mayor Quan and who recently ran for Mayor. He undoubtedly knows that Barbara Parker, whose name appears throughout these emails, is the Oakland City Attorney. Even a cursory review of the documents at issue shows that Preston and her attorneys cannot reasonably assert that they were unaware of the privileged nature of these documents.

Under California law, the privilege determination does not include reviewing the contents of a document or communication. Only an examination of the relationship between the participants to the communication is required or allowed. *Costco Wholesale Corp. v. Superior Court*, 47 Cal. 4th 725, 739 (2009) ("And because the privilege protects a transmission

1 irrespective of its content, there should be no need to examine the content in order to rule on a
 2 claim of privilege.”); see also *Clark, supra*, 196 Cal. App. 4th at 41 (“[t]he relevant inquiry is not
 3 the content of the communication but instead the relationship of the communicators.”).

4 Preston’s attorneys conducted a full review of these privileged documents in violation of
 5 the principle articulated in *Costco Wholesale Corp., supra*. In order to produce documents
 6 responsive to the defense document requests, the Attorneys necessarily had to review the produced
 7 documents for responsiveness. They reviewed these 21 documents, determined that each was
 8 responsive to the issues raised in this lawsuit and then they produced the documents. There is no
 9 possible way they can rationalize this conduct as appropriate and lawful. They necessarily
 10 reviewed the content in order to determine relevance. Under the controlling authority cited above,
 11 the Attorneys should have stopped their review immediately upon identifying the privileged nature
 12 of the documents, and then promptly returned the documents to Defendants. Instead, the
 13 documents were reviewed and produced. The failure by the Siegel & Yee Attorneys to comply
 14 with their ethical obligations requires disqualification of the firm.

15 **C. The Actions by Siegel and Yee Require that The Firm Be Disqualified**

16 Where, as here, counsel fails to cease review of privileged documents and instead makes
 17 use of those documents in the litigation, *disqualification is required*. In *Rico v. Mitsubishi Motors*
 18 *Corp*, the California Supreme Court affirmed the disqualification of the attorneys who received
 19 attorney work product and instead of complying with the obligations set forth in *State Fund*,
 20 “acted unethically in making full use of the confidential document.” *Id.* at 819. Further, in a
 21 recent appellate decision, the Supreme Court’s *Rico* holding was applied to facts substantially
 22 similar to those presented here. See *Clark v. Superior Court*, 196 Cal. App. 4th 37 (2011).

23 In *Clark*, a former employee of VeriSign had been terminated and sued VeriSign for
 24 breach of contract and other claims. *Id.* at 42. Plaintiff’s counsel subsequently sent VeriSign a
 25 letter stating that the employee intended to assert an additional claim against VeriSign based on a
 26 privileged VeriSign document the employee had taken from VeriSign in violation of his
 27 employment and nondisclosure agreements. *Id.* at 42-43. VeriSign immediately demanded the
 28 return of its privileged document, but the plaintiff attorney refused to return the document. *Id.* at

43. During discovery, the employee subsequently produced additional privileged documents belonging to VeriSign taken in violation of the nondisclosure agreement. *Id.* at 43. VeriSign moved to disqualify plaintiff's counsel on the ground that Clark and his attorney "had improperly obtained, retained, reviewed and used privileged documents, and had obtained an improper advantage from that conduct, in violation of the requirements imposed by *Rico* and *State Fund*." *Id.* at 44 (citations omitted). The court of appeal agreed and upheld the trial court's disqualification order.³

The same result is compelled here on the facts presented. Again, Preston took at least 21 attorney client privileged documents from her employer and gave them to her litigation attorneys. Instead of returning those documents and any other privileged documents, the Attorneys analyzed and evaluated the documents and produced them in response to multiple discovery requests. Just as the plaintiff attorney in *Clark* was disqualified, Siegel & Yee must be disqualified here.

Lewis v. Capital One Services, U.S. Dist. LEXIS 26978 (E.D. Va. June 10, 2004) is also on point and compelling. In that case, the plaintiff employee sued her employer alleging gender discrimination. The employee had received confidential information while working in an executive position in the Human Resources Department and had improperly taken some of those documents when she left employment. The attorney for the plaintiff referred to those removed documents in an email which showed that the attorney had knowledge of the content of the documents and an associate had reviewed at least one of the documents. On those facts, the *Lewis* court held, "the taint to Plaintiff's Counsel cannot be undone and his firm must too be disqualified." *Id.* at pg. 5.

There is no remedy short of disqualification that is appropriate here. In colloquial parlance, "the bell cannot be un-rung." The Attorneys received privileged communications which they not only failed to disclose to the defense, but they reviewed those documents thoroughly enough to

³ In the situation here, Siegel & Yee had already fully reviewed and analyzed the privileged documents before Defendants even learned that Siegel & Yee possessed the documents. Under these circumstances, demanding return of the documents would be a futile act.

1 produce them in response to the defense document requests. What is particularly outrageous about
 2 the conduct is that virtually all of the privileged documents contain legal analysis by defense
 3 counsel about the issues that plaintiff raises in this case. For example, Plaintiff documents LP
 4 283-291 contain defense counsel's discussion about the Tentative Agreement reached with
 5 Bargaining Unit 55 which is the issue raised by Plaintiff in her Complaint allegations at ¶¶ 22-25.

6 As another example, the documents produced as LP 50-58, 93-96 concern legal advice
 7 about the Rainbow Teen Center report – one of the major issues raised in the Complaint. (See
 8 Complaint, ¶¶ 18-20.)

9 Another key issue raised by Plaintiff in her Complaint is the SEIU dues collection issue.
 10 (Complaint, ¶¶ 26-33, 35-40). The documents containing the attorney client privileged legal
 11 analyses of that issue were produced by Plaintiff at LP 334-39, 390-91, 409-412, 421-22.

12 The Supreme Court's comments in *Rico supra*, are compelling and controlling. The Court
 13 noted that the attorney in that case had not only acted contrary to his obligations by fully
 14 reviewing the privileged material, but had “also acted unethically in making full use of the
 15 confidential document.” *Id.* at 819. Based on that conduct, the Court concluded that “without
 16 disqualification of plaintiff's counsel . . . the damage caused by [the attorney's] use and
 17 dissemination of the [document] was irreversible.” *Ibid.*

18 Siegel & Yee's extensive analysis of defense counsel's privileged communications about
 19 the legal issues that Plaintiff is pursuing here requires the same result.

20 **D. Plaintiff Improperly Removed Other Confidential Documents From The City**

21 In addition to taking the attorney-client privileged documents which she produced,
 22 Plaintiff took numerous other confidential documents that must be returned to the City.

23 In reviewing City documents to identify relevant documents, Oakland learned that
 24 throughout 2013, Plaintiff regularly forwarded confidential emails and documents from her City
 25 computer to her personal email. These included confidential report drafts regarding the Rainbow
 26 Teen Center investigation and emails exchanged among the investigative team that was reviewing
 27 the hiring, contracting and purchasing issues at the Rainbow Teen Center.

1 Plaintiff also forwarded documents regarding a personnel investigation and documents
 2 containing data the City analyzed for its collective bargaining proposals to its unions, as well as
 3 the attorney-client privileged documents. Oakland's current review shows that Plaintiff sent 44
 4 emails from her computer to her personal email between January 1, 2013 and October 3, 2013 and
 5 those 44 emails included an astonishing 2,978 pages of attachments. Almost all of those
 6 attachments are internal confidential City documents of which many implicate the deliberative
 7 process privilege. (Spellberg Decl. ¶7.) Significantly, when Oakland asked Plaintiff via document
 8 requests and interrogatories to identify the City documents that she had taken, Plaintiff's
 9 Attorneys objected that identifying such documents "would produce a voluminous mass of
 10 documents that would be irrelevant to the claims and defenses in this case," and then she
 11 responded that "these documents are equally in defendant The City of Oakland's possession."
 12 With this evasive response, it is evident that Plaintiff does not deny taking internal City
 13 documents.⁴

14 **E. The Court Should Order the Return of All Documents Taken by Plaintiff, Not**
 15 **Just the Attorney Client Privileged Documents**

16 The Court should order Plaintiff Preston to return *every single document* that she has taken
 17 from Oakland. This means that she must return every hard copy, every electronic copy and every
 18 data storage device that contains any City document. To the extent Plaintiff and her Attorneys
 19 have placed any City documents on their computers, those documents must be permanently
 20 removed from the computers and Plaintiff and her Attorneys required to provide affirming
 21

22 ⁴ Plaintiff is not allowed to steal confidential City documents, particularly those protected under the deliberative
 23 process privilege which protects documents that are prepared in order to assist an agency decision maker in arriving at
 24 his or her decision and that, if released, would expose an agency's decision making process in such a way as to
 25 discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.
Hongsermeier v. Commissioner of Internal Revenue, 621 F.3d 890, 904 (9th Cir 2010)(quoting US Dep't of
 Commerce, 307 F.3d 1084, 1089 (9th Cir. 2002) .

26 Discussions between Defendant Santana and the investigative team that reviewed the issues raised in this lawsuit
 27 are privileged to the extent that they are pre-decisional and deliberative. The same is true of documents upon which
 28 the City based its bargaining positions and responses to the unions during bargaining. These are the types of
 documents taken by Plaintiff and which her Attorneys refuse to identify in response to the discovery requests.

1 affidavits.

2 In the *Clark v. Superior Court* decision, the employer not only successfully obtained an
3 order disqualifying the plaintiff's lawyer, but the employer successfully obtained return of the
4 documents that had been improperly taken. *Clark, supra*, at 196 Cal. App. 4th at 45.

5 An employee cannot take confidential documents from her employer when leaving
6 employment. The decision of *Pillsbury, Madison & Sutro v. Schetman*, 55 Cal.App.4th 1279
7 (1997) is controlling. In that case, employees of the Pillsbury, Madison & Sutro firm were
8 terminated and they took confidential firm documents which they gave to their attorneys to assist
9 in the litigation. The firm sued the attorneys for equitable relief seeking return of the documents.
10 The trial court issued the injunction ordering return of the documents and the appellate court
11 affirmed. The court noted that plaintiffs bringing employment cases cannot engage in "self-help"
12 by stealing documents from their former employer. *Id.* at 1289.

13 The Ninth Circuit's analysis of this issue is congruent. *See O'Day v. McDonnell Douglas*
14 *Helicopter Co.*, 79 F.3d 756 (at 762-765), where an employee took confidential documents to
15 support an anticipated lawsuit against his employer and the Ninth Circuit affirmed the District
16 Court ruling requiring the employee to return the purloined documents.

17 Preston engaged in the same "self-help" that the appellate court condemned in *Pillsbury,*
18 *Madison & Sutro, supra*. Her conduct is even more outrageous in that among the thousands of
19 documents that she took, there were numerous attorney client privileged documents. The Court
20 should order Plaintiff to return all documents of every kind that she took from the City; the
21 attorney client privileged documents and every other document of any kind. To assure that the
22 City is not prejudiced by this misconduct as the litigation proceeds, Defendants request an Order
23 that Plaintiff and her Attorneys provide affirming affidavits that they have returned and/or
24 permanently deleted every single document from all computers and data storage devices.

25 **IV. Conclusion**

26 For the foregoing reasons, Defendants request the following orders:

27 1. That Siegel & Yee (and all attorneys and paralegals in the firm) are disqualified
28 from representing Plaintiff Preston in this action and prohibited from providing any assistance to

3. That Plaintiff Preston return to Defendants all documents of any kind that she took from the City of Oakland , including returning all hard copies, electronic copies, all storage devices that contain such documents, and permanently delete from all of her computers and storage devices all City of Oakland documents.

Respectfully submitted,

13 DATED: December 23, 2014

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: /s/ Geoffrey Spellberg

Camille Hamilton Pating

Geoffrey Spellberg

*Attorneys for Defendants CITY OF OAKLAND
and DEANNA SANTANA*

DATED: December 23, 2014

By: */s/ Otis McGee*

Barbara J. Parker

Otis McGee, Jr.

Maria Bee

James F. Hodgkins

*Attorneys for Defendants CITY OF OAKLAND
and DEANNA SANTANA*

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